UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CAYUGA MEDICAL CENTER AT ITHACA, INC.	**Cases 03-CA-156375** **03-CA-159354** **03-CA-162848** **03-CA-165167** **03-CA-167194**
and	
1199 SEIU UNITED HEALTHCARE WORKERS EAST	

GENERAL COUNSEL'S ANSWERING BRIEF

Pursuant to Section 102.46(d)(1) of the Board's Rules and Regulations, Counsel for the General Counsel hereby submits this Answering Brief in response to Respondent's Exceptions to the Decision and Recommended Order of Administrative Law Judge David I. Goldman (ALJ) dated October 28, 2016, in the above-captioned cases. Under separate cover, General Counsel also files with the Board on this date Cross-Exceptions and a brief in support of the Cross-Exceptions. It is respectfully submitted that in all respects, other than what is excepted to in General Counsel's limited Cross-Exceptions, the findings of the ALJ are appropriate, proper, and fully supported by the credible record evidence.

I. Preliminary statement

The ALJ found that Respondent committed numerous and serious unfair labor practices. More specifically, the ALJ concluded that Respondent violated Section 8(a)(1) of the Act by maintaining certain unlawfully overbroad employee rules, disciplining an employee because of his protected and concerted activities pursuant to an unlawfully overbroad rule, soliciting employees to report on union activities, directing employees to cease distributing union literature, telling employees it is inappropriate to discuss salaries and/or wages, interrogating an

employee about union activities, threatening an employee with unspecified reprisals if her union activities did not cease, prohibiting the distribution and posting of union literature, removing and confiscating union literature, and threatening employees with unspecified reprisals and job loss in retaliation for participation in protected and concerted activities. (ALJD at 70:1-45; ALJD at 73:9-40; ALJD at 74:4-12).[1]

The ALJ further concluded that Respondent violated Section 8(a)(3) and (1) of the Act by suspending an employee, issuing a verbal warning to an employee, demoting an employee, and issuing an employee an adverse performance evaluation in retaliation for her union activities. (ALJD at 70:47 – 71:8; ALJD at 74:10-20).

The ALJ's factual findings to that end are adopted herein and can be found throughout his decision before the analysis of each violation.

Respondent's attempt, through its Exceptions, to reverse every adverse finding in the ALJ's comprehensive judicious decision (ALJD) is largely based on unfounded assertions and mischaracterizations of the record.[2] The following Answering Brief highlights the most grievous errors.

[1] References to the ALJ's Decision shall be designated as (ALJD ___:___) showing the page number first followed by the line numbers; to the Respondent's Brief as (R. Br. __) where the blank is the page number; to the transcript as (Tr. __); to the General Counsel's Exhibits as (GC Exh. ___); and to the Respondent's Exhibits as (R. Exh.___).

[2] For example, Respondent asserts that the Counsel for the General Counsel's opening statement claimed the hospital has inadequate staffing and burnt out nurses. This distorts the opening statement and is just one of the falsities in this case. The opening statement did nothing more than correctly assert that the hospital's own nurses *believed* that the hospital was understaffed and *felt* burnt out, which formed the basis for their protected concerted activity and support of the Union. (Tr. 20-22). The existence of an unidentified "reputable" national survey stating that the hospital has adequate staffing is irrelevant to the nurses' perceptions about their working conditions. There is no dispute that nurses concertedly complained about these issues and tried to form a union to address them before Respondent committed a myriad of unfair labor practices in an effort to halt the campaign.

Contrary to Respondent's assertions, it is clear that after thoroughly assessing and weighing the credible evidence, the ALJ correctly held Respondent responsible for its actions during the Union campaign and the Board should uphold the ALJ's determinations in that regard. Inova Health System v. NLRB, 795 F.3d 68, 74 (D.C. Cir. 2015); E.N. Bisso & Son, Inc. v. NLRB, 84 F.3d 1443, 1444 (D.C. Cir. 1996); Standard Dry Wall Products, 91 NLRB 544 (1950). Moreover, the witnesses Respondent encourages the Board to credit concealed exculpatory documentary evidence, suffered through multiple impeachments, and had testimony controverted by their own emails, affidavits, and evidence. Respondent's general assertions that these witnesses should be credited are entirely baseless. (R. Br. at 2).

II. The ALJ properly concluded that Respondent maintains in its Nursing Code of Conduct unlawfully overbroad employee rules that violate Section 8(a)(1) of the Act.

As discussed in General Counsel's Cross-Exceptions, Respondent's Nursing Code of Conduct contains additional 8(a)(1) violations. The three Nursing Code of Conduct rules that Respondent objects to are straightforward violations. What Respondent describes as "the ALJ's tortured analysis" of the rules in this case was in fact a thorough review of the law and a critical examination of the facts. (R. Br. 6). Respondent admits multiple times in its brief that the code of conduct is "written in broad terms." (R. Br. 4, 6). Respondent's claim that the rules are lawful because the code of conduct does not explicitly tell employees they cannot engage in protected activity is not grounded in Board law. (R. Br. 5). Board law requires overly broad rules to be rewritten so a reasonable employee would not read them as restricting their rights. Lutheran Heritage Village-Livonia, 343 NLRB 646, 647. The three rules Respondent wishes to keep unaltered in its code of conduct are unlawfully overbroad and the Board should concur in the ALJ's finding in this regard.

The first rule Respondent takes issue with is the rule which requires employees to "utilize proper channels to express dissatisfaction with policies and administrative or supervisory actions and without fear of retaliation." (R. Br. 6). By including the word "proper" this rule emphasizes that there are improper channels to do so. Contrary to Respondent's assertion that the code of conduct "does not reference supervisors or managers at all," this rule clearly references supervisory actions and policies. (R. Br. 5). It attempts to regulate the manner in which employees express dissatisfaction by indicating that there is a "proper" way to do so. Any employee who wishes to "express dissatisfaction with administrative or supervisory actions" to generate substantive change would need to do so with managers and supervisors. Importantly, based on reading this rule, employees would also reasonably believe that less formal channels, like concertedly complaining about certain work-related policies, would be prohibited.

The second and third rules Respondent objects to are "Inappropriate and disruptive communications/behaviors include but are not limited to[:] Displays behavior that would be considered by others to be intimidating, disrespectful, or dismissive. Criticizes coworkers or other staff in the presence of others in the workplace or in the presence of patients." (R. Br. 5; GC Exh. 3). Respondent asserts that Roomstore, 357 NLRB 1690, 1690 fn. 3 (2011) should be considered as the Board should consider the "surrounding circumstances." Here the context for the word "intimidating" is different than it was in Palms Hotel & Casino, 344 NLRB 1363 (2005), a case that Respondent encourages the Board to rely on in reversing the ALJ.

Respondent asserts that the ALJ's distinguishing of Palms Hotel was poorly-reasoned, but fails to explain its issue with the ALJ's reasoning. (ALJD at 9:fn 9). Palms Hotel could only be analogous to the second, not the third rule addressed here, yet Respondent tries to use this case to paint both rules with the same brush. The distinguishing feature here is that unlike the

Palms Hotel rule, which relies on the actual effect of employee conduct, Respondent's rule relies on other's "consideration." One could consider a comment to be "disrespectful" without the actual employee feeling disrespected. It invites employees to be hypersensitive to the statements of others. The broadness of its terms encourages employees to decide how others might feel if they heard the same comment, regardless of the effect it had on them personally.

Further, the rule in Palms Hotel, unlike here, proscribes employee conduct that is so egregious and specific there is no question the employee would lose the protection of the Act. The only overlapping word between the Palms Hotel rule and Respondent's rule is "intimidating." Much like Valley Health System, where the Board found the rule unlawful, the overlapping word has a different context. Valley Health System, LLC, 363 NLRB No. 178, slip op. at 2 (2016). As the Board explained in Valley Health System, the Palms Hotel rule was unlawful because it "was clearly directed at egregious and unprotected misconduct." Valley Health System, LLC, 363 NLRB No. 178, slip op. at 2. Respondent's rule, much like the rule in Valley Health System, does not describe conduct which would be otherwise unprotected by the Act. Thus, the rule should be held unlawful.

In its brief, Respondent also fails to mention that the third rule was indeed used to discipline an employee (Scott Marsland) who was exercising his Section 7 rights. (ALJD at 37:20-22). Thus, even if the Board failed to find that the third rule addressed here violated prong one of Lutheran Heritage, which it did as the rule is overbroad, at a minimum prong three was violated which renders the rule unlawful.

III. Certain statements in Respondent's hospital-wide emails violate Section 8(a)(1) of the Act.

As the ALJ explained the hospital sent a series of nine emails and letters to all 350 members of the hospital nursing staff which "are fairly characterized as devoted to providing

information and argument to employees against unionization." (ALJD at 10:38-39). The ALJ correctly found that certain contents from these anti-union communications were unlawful. Specifically, in the first letter on May 7 Respondent told employees "if you feel you are being harassed or intimidated feel free to contact your supervisor, director or security." The next unlawful statement came on August 26 when Respondent told employees "if you feel that you continue to be harassed you have every right to file a complaint in our incident reporting system, and notify your Director so that we can address the behavior with the individual involved."

Respondent now asks the Board to find these statements lawful. It is clear that these emails were crafted as a direct result of the union campaign. Respondent implores the Board to find the statements lawful, in part, because there were other emails sent that did not contain the unlawful language. (R. Br. 9). Respondent asks the Board to look at these other emails for context. (R. Br. 9). However, these emails were sent a month apart. It is not practical to expect employees to print and keep each email to review together when a new email is released and form a mental checklist for what messages were contained in each. The rational reaction is that employees are going to read each email as they come.

Even if they were to be reviewed in context with just the other emails alone, not in the context of the other unlawful actions Respondent took during the course of the campaign (i.e., delivering the May 7 letter one-on-one to employees to interrogate them about their union activity) that negate any alleged "neutral" statements they may have made, Respondent fails to mention that the unlawful May 7 letter was sent before the other emails. Thus, employees reading the first letter would not have had the benefit of the subsequent emails for context. Moreover, as the ALJ rightly points out, included in the May 7 letter were bullet points that include "You will at some point be asked or more likely pressured to sign a union authorization

card." (ALJD at 11:46-48). The August 26 letter included the question, "I feel like I am being harassed and pressured to sign a card, what can I do?" (ALJD at 11:50-51). Again, as the ALJ accurately notes this suggests that the letters have employees equate "harassment" with being pressured to sign a card and unlawfully encouraging the reporting of others for soliciting them to sign. (ALJD at 12:2-10).

Respondent also wants the Board to rely on Alan Pedersen's unsubstantiated testimony that "a number of CMC employees complained about being pressured to sign a union authorization card." (R. Br. 8). First, this clearly puts the emails in the context of signing authorization cards, something which Respondent later argues in its brief to not be the context for the emails. (R. Br. 9-10). But equally significant is the fact that this claim was entirely unsupported. There were no emails supplied by Respondent showing employees felt intimidated, no specific examples of employees who came forward, and no incident reports showing employees felt intimidated (which was encouraged in the August 26 letter). Thus, Respondent's argument on this point fails and the ALJ's decision should be upheld.

IV. Respondent unlawfully stopped employee union activity in the cafeteria in violation of Section 8(a)(1) of the Act.

Respondent contends that management's telling employees not to set up a fixed table in the cafeteria to distribute union material, on two separate occasions, is lawful. (R. Br. 10). During the hearing, Respondent admitted that the first incident involved the employee being approached by the CEO, the Vice President of Public Relations as well as the Vice President of Human Resources when being told to leave. (Tr. 60). On the second occasion, Respondent threatened to call security to remove the materials when the employee asserted his federally protected right to distribute the material. (ALJD at 13:25-40). A threat which Pedersen denied making until he was confronted with the video testimony demonstrating that he did exactly that.

(Tr. 62). Yet, Respondent wants the Board to believe that employees were not intimidated by these encounters. (R. Br. 13).

This was more than just "one episode of discriminatory enforcement of a no solicitation/no distribution rule" as Respondent contends. (R. Br. 13). In the cafeteria alone there were two incidents. There were also other incidents throughout the hospital, including but not limited to, Respondent's removal and destruction of posted union literature and the removal of loose union flyers from break room tables. As detailed by two separate emails, Respondent's internal policy on the matter was "they have the right to put up and we have the right to take down." (ALJD at 20:42-45). Respondent's management took flyers off the break room table and removed posted flyers to bring them to Human Resources as many as four times a day. (ALJD at 21:2-5). The ALJ further found that a member of management continued to remove flyers days before the hearing began and told an employee that she could not post. (ALJD at 21:13-14). The incident in the cafeteria was not a "single episode of discriminatory enforcement of a no solicitation/distribution rule" but rather was symptomatic of Respondent's policy to stop solicitation and distribution.

Respondent claims that after these incidents management elected to "take a hands-off approach," permitting subsequent tabling. (R. Br. 12). However, what Respondent fails to mention now, though it was admitted at trial, is that no repudiation occurred. (Tr. 66, 281, 418). Respondent never told employees they could table in the cafeteria, instead electing to stay silent. Certainly, the fact that discipline never issued as a result of these interactions does not render the violation "fully remedied" as Respondent contends. (R. Br. 14). A repudiation of such a violation would involve at a minimum informing employees that they are indeed permitted to set up a table in the cafeteria, which Respondent did not do. See, e.g., Passavant Memorial Area Hospital,

237 NLRB 138 (1978). Accordingly, the ALJ correctly determined that Respondent's statements and conduct in the cafeteria violated Section 8(a)(1) of the Act.

V. Respondent unlawfully informed employees that discussing salaries/wages was inappropriate.

The ALJ's assessment of this incident was a credibility determination, which as previously discussed should be given deference. It is well established that the Board does "not overrule a Trial Examiner's resolutions as to credibility except where the clear preponderance of *all* the relevant evidence convinces us that the Trial Examiner's resolution was incorrect." Standard Dry Wall Products, Inc., 91 NLRB 544, 545 (1950).

Contrary to Respondent's assertion the ALJ did not find that the incident occurred "at some unspecified time during the 10(b) period." (R. Br. 14). Rather, the ALJ found that the incident occurred sometime "between the Fall of 2015 and early Winter 2016." (ALJD at 15:16-17). Alan Pedersen's directive to a group of employees not to discuss salaries/wages was not simply a "one instance" conversation to which the ALJ credits the General Counsel's witness over Respondent, but rather more evidence of a pattern of Respondent's behavior, making General Counsel's witness more credible. A pattern which Respondent conveniently fails to make any mention of in arguing this particular determination should be reversed.

Respondent again insists on mischaracterizing the facts about this conduct and misses the point. The letter Respondent refers to in its brief at page 15, which Human Resources issued to staff explicitly asking them to keep their salary information confidential, was merely used for impeachment purposes and evidential of Respondent's practice of encouraging employees to keep their salary information confidential. (GC Exh. 5, 6; Tr. 49). Respondent failed to mention in its brief that Alan Pedersen admitted that Respondent "encourages individuals not to have the type" of salary discussion that is at issue here. (ALJD at 15:35-36). Respondent failed to mention

in its brief that Alan Pedersen further admitted that it is a generally accepted practice that employees should not have that discussion. (Tr. 48). Moreover, Respondent in its brief failed to mention that another supervisor Joel Brown, took down a flyer where the nurses were writing their years of experience and corresponding salaries. (Tr. 180; GC Ex. 19). With respect to the alleged incident here, while Alan Pedersen, did not remember the incident occurring, he never claimed the incident had not occurred. (ALJD at 15:30-35; ALJD at 15:fn. 15). Thus, the ALJ properly found that Respondent, by Alan Pedersen, violated Section 8(a)(1) of the Act by unlawfully informing employees that it was inappropriate to discuss their salaries and/or wages.

VI. The ALJ appropriately determined that an employee was unlawfully interrogated and threatened in a one-on-one Meeting

Respondent's assertions on this point are all highly misleading. The ALJ's thorough facts on this point are incorporated herein. (ALJD at 16-19). Contrary to Respondent's assertion, General Counsel offered two witnesses to address the one-on-one interrogations that took place in the ICU regarding union activity on or around May 8. (R. Br. 17). The ALJ credited both employee witness accounts of their interactions in the one-on-one interrogation over the testimony of their interrogator, Joel Brown. (ALJD at 18:36; ALJD at 18:42). The interrogator, on the other hand, attempted to convince the judge that he was "indifferent to unionization," despite the fact that he enthusiastically removed union literature as many as four times a day and had his team do this as well. (ALJD at 18:45-46; ALJD at 19:1-19). The ALJ's determination on this point was thorough and largely based on credibility assessments which should be credited. See, e.g., United States Postal Service and National Postal Professional Nurses, 355 NLRB 368, 368 fn. 2 (2010) ("The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect.

Standard Dry Wall Products, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951).”). Thus, the ALJ properly found that Respondent unlawfully interrogated Marshall for her union activities and threatened her with unspecified reprisals unless she ceased her union activities.

VII. The ALJ correctly found that Respondent prohibited employees from distributing and posting union literature in violation of Section 8(a)(1) of the Act.

Again, Respondent perverts the facts. Respondent states that “CMC does not dispute that one or more supervisors **occasionally** took down some pro-union postings, particularly after receiving complaints from other employees about the postings.” (R. Br. 24, emphasis added). The record demonstrates that starting in May 2015, Respondent removed union materials from break room tables and took union materials down from bulletin boards, sometimes at a frequency of four times a shift. (Tr. 1007, 1035, GC Ex. 22, 23, 24, 44, 47). Respondent’s supervisors took the stance that “they have the right to put up and we have the right to take down.” (GC Ex. 24). This included taking away non-posted material. (GC Ex. 24). Linda Crumb sent the following email to senior management “When you make your rounds please remove Union material at time clocks and break rooms or anywhere else you find them. Security has been instructed to do the same. They have the right to put up and we have the right to take down.” (GC Ex. 22). Mere days before the administrative hearing commenced in May 2016, Respondent’s supervisors were still tearing down union literature and telling employees they could not post. (ALJD at 21:11-14). The hearing transcript, along with the ALJ’s determination, is proof that the “undisputed evidence” does not establish what Respondent claims. (R. Br. 24). This is all in addition to the issue of Respondent twice addressing union tabling in the cafeteria.

Contrary to Respondent’s assertion, the employer failed to establish that it had a regular practice of removing non-business related material. (R. Br. 24). Respondent allows a wide array of non-work related postings on its community bulletin board, and it banned the distribution and

posting of union-related materials based purely on their Section 7 character. As the ALJ explains in the decision "The testimony and internal employer emails demonstrate that the Hospital engaged in a concerted effort to remove prounion postings. This included supervisor removing materials." (ALJD at 22:4-10). The ALJ made a point to highlight that "the internal emails and the testimony refute the suggestion of Respondent that the union materials were only removed in nondiscriminatory fashion as part of a weekly removal of dated items from the bulletin board." (ALJD at 22: fn. 25). The evidence demonstrates that Respondent unlawfully prohibited employees from posting and distributing union literature in violation of Section 8(a)(1) of the Act.

VIII. Respondent's threatening Facebook posts violate Section 8(a)(1) of the Act.

Initially, all of Respondent's arguments in its Exceptions on this point were explicitly addressed and dismissed by the ALJ in his decision. As the ALJ states in his decision "The Respondent's defense is without merit. Essentially, it argues that House Supervisor Florence Ogundele's postings were a personal 'lashing out' motivated by personal offense, do not explicitly mention the word union, and do not expressly state that she was going to take actions against people at work." (ALJD at 26:16-19).

Contrary to Respondent's assertions, Respondent's house supervisor "responding in anger" to an employee's Facebook post is not an excuse for making unlawful threats. (R. Br. 25) (ALJD at 24:14-19). In fact, what she was responding to was an employee's protected concerted activity in the form of a post requesting support for another employee's protected concerted activity. (ALJD at 25:1-2). Further, as Respondent admits, the supervisor's second post was made after she was directed to remove her first post. (R. Br. 26). This not only proves Respondent's knowledge of the post, but also the fact that it was more than an "isolated incident" as Respondent argues. (R. Br. 27).

Respondent's contention that "her postings never mention the Union" is entirely disingenuous. (R. Br. 26). The house supervisor's postings are clearly directed at the Union and the Union's supporters. In her first post, she directs her comments to main union supporter Scott Marsland and his "disciples." (ALJD at 25:10-12). As the ALJ states, "she then continued with what can only be reasonably understood as some kind of a warning to Marsland and those allied with him (his 'disciples')." (ALJD at 25:10-12). In her second post she states "I am not telling you not to give 2% of your earning to them but you need to think about what that 2% means to your families" and "I want you to look at the people who are sending you email, sending letters to your home and calling you to join[ ] their cause." (ALJD at 23:14-37). The only reasonable interpretation of these statements and others contained in her post is that she is referring to the union supporters.

Respondent also wants to distance the supervisor's posts from Respondent's hospital, but her posts make it clear that her posts were directed to Respondent's employees. As part of her second post she states "To my fellow CMC who is tired of all the bullshit going on at work and the people supporting them this is what I want to say." (ALJD at 23:20-21). In this capacity she makes clear threats as well, "I want you to take a good look at them, you will see that if you follow any one of them it will lead you to unemployment, these people have nothing to lose." (ALJD at 23:24-25). She also states "when you decided to attack me you just opened a can of worm that you [cannot] close." (ALJD at 23:36-37). In her first post she states, among other comments, "you want to fight let's do it face to face" and "this is my advice for you, don't mess with me and tell your disciples the same." (ALJD at 25:14-18). Ogundele's Facebook posts are unlawful according to Section 8(a)(1), and the ALJ's decision in this regard should be upheld.

IX. Respondent's October 5 verbal warning issued to Scott Marsland violates the Act.

Again, Respondent overstates its position by claiming that the "undisputed evidence establishes" a conclusion that is not true. In this case, Respondent wants the Board to believe that Marsland was not engaged in protected concerted activity. However, in the September 24 meeting, in response to a supervisor's contention that the department was doing a good job covering breaks and thanked a specific nurse's efforts, Marsland complained that that specific nurse and another nurse were not clinically competent to cover breaks in the high acuity areas so the break coverage praise was undeserved. (ALJD at 27-30).

Respondent's contention that "there is no evidence in the record to suggest that any other employee joined in these individual concerns or supported the views that Mr. Marsland expressed in this meeting regarding the competency of his fellow nurses" is entirely untrue. Marsland described the discussion amongst his colleagues about the inability to take breaks as "part of the air we breathe in at Cayuga Medical Center." (Tr. 502). Specifically, on a weekly basis the nurses would discuss their disgruntlement about Deb Scott's ability and whether or not she was capable of covering breaks. (Tr. 504, 530). There were also a few discussions about Gail Peck's ability to cover for breaks based on her ability. (Tr. 505). Another employee, Cheryl Durkee, testified that she specifically brought up the clinically competent break coverage issue with Kevin Harris. (Tr. 530). Mathews believed Durkee may have even brought the lack of break issue to her attention. (Tr. 576). There were not as many discussions about Peck because she was not being used to cover breaks as frequently. (Tr. 505). In addition, the ALJ cites another example which happened the day before the September 24 staff meeting when another nurse complained to Marsland about her concerns having that specific nurse cover for her. (ALJD at 25:26-31).

Again Respondent attempts to mislead the Board by stating that the ALJ acknowledged "Mr. Marsland's conduct **was** 'out of line.'" (R. Br. 30, emphasis added). Rather, the ALJ actually states "While I fully agree that an employee does not have the right to take over or disrupt a staff meeting, and while Marsland **might have been** 'out of line' to persist over Mathews objections, I find that his actions fall far short of the type of 'opprobrious conduct' (*Atlantic Steel*, 245 NLRB at 816) that would weigh against continued protection of the Act." (ALJD at 36:7-10). Marsland was unlawfully disciplined for engaging in protected concerted activity when he expressed concerns of his fellow nurses about clinically competent coverage for nurse breaks pursuant to an unlawful rule contained in the nursing code of conduct. Accordingly, the Board should uphold the ALJ's findings on these issues.

X. The ALJ properly concluded that Respondent suspended Anne Marshall, issued her a verbal warning, demoted her and issued her an adverse performance evaluation in retaliation for her union activities in violation of Section 8(a)(1) and (3) of the Act.

Not only did Respondent fail to address all of the pertinent facts in its recitation, but Respondent failed to cite a single case to support its position about Marshall's suspension, verbal warning, demotion, or performance evaluation. Instead, Respondent cherry picks and exaggerates certain facts that it believes are in its favor. The best example can be seen on page 35 of Respondent's brief where it states that upon her first meeting of the new interim director, Marshall "flipp[ed] her middle finger at her." (R. Br. 35). This behavior, which Respondent states in its brief as if it were fact, was extensively discussed and dismissed by the ALJ. (ALJD at 60:fn. 55). Respondent falsely elevated Marshall's alleged flippant behavior to her flipping off her new director in their first interaction. (ALJD at 60:fn. 55). As the ALJ describes, "Like a plant grows when watered, the fabrication that Marshall 'flipped off' Beasley took root over the course of the demotion." (ALJD at 60:fn. 55). Similarly, Respondent tries to claim that Counsel for the General Counsel stated that Marshall's evaluation was the only evaluation that changed

between 2014 and 2015, which is a false claim unsupported by the record and is not the General Counsel's contention. Rather, "Marshall was singled out and given a lower ranking on the subjective portion of the evaluation," which differs from what Respondent's supervisor Linda Crumb testified was to happen and Marshall was the only employee to lose a point for a subjective item.[3] (ALJD at 69:6-8). The ALJ's recitation of the facts addresses Respondent's factual concerns,[4] is incredibly thorough, and fairly assesses the testimonial and documentary evidence. (ALJD at 38-69).

Respondent longs for the Board to discredit Marshall in favor of its witnesses for the suspension, verbal warning, demotion, and performance evaluation. However, as has been previously discussed, the ALJ's credibility determinations should stand, "except where the clear preponderance of *all* the relevant evidence convinces us that the Trial Examiner's resolution was incorrect." Standard Dry Wall Products, Inc., 91 NLRB 544, 545. Respondent fails to cite all of the relevant evidence, but instead relies on its discredited witnesses. Further, what Respondent tries to characterize as discrepancies in Marshall's testimony is nothing more than non-contradictory responses to different questions posed. Respondent also again contends that Marshall should be discredited because she made an accusation against a former manager which the New York State Division of Human Rights dismissed. (R. Br. 31). Again, this is an argument Respondent posed to the ALJ which he discussed and rejected. (ALJD at 19:fn. 22). As the ALJ

[3] "Marshall was assessed a 'No' on 'Demonstrates a sense of right and wrong by exhibiting honest, ethical behavior,' a criterion that had not been part of the personal accountability section (or found anywhere else on the evaluations) since 2010. This is the reason that Marshall lost a full point in 2015 compared to 2014. Crumb testified that as far as she knew, no other ICU employee lost a point for this item in 2015." (ALJD at 68:25-31). The few other nurses who lost points were for mandatories, such as education requirements and attendance, not the subjective criterion that was used against Marshall.

[4] A key example of this can be seen on page 49 of the ALJ's decision where he expressly considers and rejects all of Respondent's alleged comparator evidence which it asks the Board to consider on page 36 of its brief. (ALJD at 49:1-44) (R. Br. 36).

stated "The mere rejection of the charges by the State of New York hardly provides evidence of distortion or falsification of information, much less that the matter had been undertaken in pursuit of a personal agenda." (ALJD at 19:fn. 22). The ALJ goes on to say that "If this attack on Marshall came from Brown's mouth – it did not – it would at least, while still unsupportable, perhaps be understandable as a personal response to having one's conduct called into question. But as an employer's explanation for a dismissed charge of sexual harassment, it speaks volumes about the animus towards Marshall." (ALJD at 19:fn. 22). The ALJ's credibility determinations should stand.

XI. Conclusion

Respondent's exceptions to the ALJ's thorough and well-researched decision are baseless and demonstrate a careless disregard for the record evidence. For all the reasons set forth above, Counsel for the General Counsel respectfully requests that the Board deny Respondent's Exceptions to the Decision of the Administrative Law Judge in their entirety.

DATED at Buffalo, New York this 9th day of December, 2016.

Respectfully submitted,

/s/ Jessica L. Noto

JESSICA L. NOTO
Counsel for the General Counsel
National Labor Relations Board
Region Three
130 South Elmwood Avenue
Suite 630
Buffalo, New York 14202